

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

IN RE: ETHICON, INC., PELVIC
REPAIR SYSTEM PRODUCTS LIABILITY) MDL NO.
2:12-md-2327

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE CHERYL A. EIFERT
UNITED STATES MAGISTRATE JUDGE
THURSDAY, APRIL 16, 2015; 2:05 P.M.
CHARLESTON, WV

Proceedings recorded by mechanical stenography,
transcript produced by computer.

Mary A. Schweinhagen, RMR, CRR
Federal Official Court Reporter
300 Virginia Street, East
Charleston, WV 25301

*** **

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1 PROCEEDINGS had before the Honorable Cheryl Eifert,
2 United States District Court, Southern District of West
3 Virginia, as follows:

4 THE CLERK: This is Laura, Judge Eifert's judicial
5 assistant, and I would first like to confirm a court reporter
6 is on the line today, Mary Schweinhagen.

7 COURT REPORTER: I'm here.

8 THE CLERK: May I have plaintiff's counsel, please.

9 MS. BOSSIER: Sure. My name is Sheila Bossier,
10 B-O-S-S-I-E-R, and I'm with the plaintiff.

11 MR. HARLOE: John Harloe for --

12 THE CLERK: John Harloe, all right.

13 Anyone else for plaintiff's counsel on the line?

14 How about defense counsel, please.

15 MR. BERNARDO: Richard Bernardo for Ethicon.

16 MR. WATSON: Ben Watson for Ethicon.

17 THE CLERK: All right. Thank you.

18 MR. PARRISH: And Ashley Parrish for Ethicon.

19 THE CLERK: All right. Thank you. Is there anyone
20 else on the line for defense counsel?

21 All right. Is that everyone today?

22 MS. TURMAN-VEDRAL: This is Sara Turman-Vedral -- I
23 just joined -- for the plaintiffs.

24 THE CLERK: All right. Sara, would you spell your
25 last name for me, please?

1 MS. TURMAN-VEDRAL: It's Turman. T as in Timothy,
2 -U-R-M-A-N, then a hyphen, and V as in Victor, -E-D-R-A-L.

3 THE CLERK: Thank you very much.

4 All right. If that's everyone, I will get Judge Eifert.

5 And just a reminder, per usual, that when speaking please
6 say your name so that it will be included with the court
7 reporter in the transcript. Thank you.

8 THE COURT: Hello? Hello there.

9 UNIDENTIFIED SPEAKER: Good afternoon, Judge.

10 THE COURT: Good afternoon.

11 UNIDENTIFIED SPEAKER: Good afternoon, Your Honor.

12 UNIDENTIFIED SPEAKER: Good afternoon.

13 THE COURT: I've got everybody's names, and we have
14 Mary on the line with us, so I know Laura's already reminded
15 you to please state your name before you speak, but if you
16 would also mute your phone if you are not speaking and try not
17 to make a lot of noise in the background, try not to type and
18 open and close drawers and things like that, that would be
19 very helpful.

20 So why are we here today?

21 MR. BERNARDO: Judge Eifert, this is Rich Bernardo,
22 and first I want to apologize in advance for my frogginess. I
23 am getting over a cold here. So I hope I am audible.

24 We are here by way of follow-up to the teleconference we
25 had with you back in February regarding Ethicon's motion that

1 you granted to coordinate a privilege dispute that was ongoing
2 in a Texas case, if you recall. And we wanted to touch base
3 with you essentially to follow up from that point, letting you
4 know where we are and what we're hoping we might be able to
5 ask from you.

6 And if it's okay with you, I thought maybe I would give
7 you that background and then, of course, plaintiffs can join
8 in. I am sure you may have some questions.

9 THE COURT: All right. Yes. And let me tell you,
10 after we had our conversation back in February, I did speak
11 with Judge Goodwin and Kate. We had a telephone conversation
12 about it. And we were all in agreement that these are the
13 sorts of things that it would be wonderful to coordinate.

14 We were also all in agreement that it's one of those
15 things that it's like trying to nail Jello on a wall as far as
16 actually doing something about it, which is why I haven't
17 issued a formal written order, because I really didn't know
18 what to say other than what I had said during the telephone
19 call, which is that I want the litigants in the MDL to
20 coordinate to the degree that they can to notify me of the
21 issues as they arise.

22 And that was where Judge Goodwin felt the most could be
23 done, and it would be in a notification. So what he has
24 suggested is to have the parties notify both -- if it's a
25 discovery issue or if it's an issue that would go to him,

1 whichever one of us, to notify the judge when there is an
2 issue that should or could be coordinated, to let us know when
3 there are rulings by other judges that would affect the MDL,
4 and just to generally keep us apprised of what's going on so
5 that we have an opportunity to contact the other judges as
6 issues are arising in front of them that have some importance
7 to the MDL.

8 I think one of the things that makes it difficult is that
9 there are so many combinations in these MDLs as far as claims
10 go that it's hard to coordinate everything. It's not your
11 typical MDL where you would have, for example, one
12 pharmaceutical at issue. Here we've got the combinations of
13 different products, and maybe just one product or two products
14 and different manufacturers. So it's much more complicated
15 than the standard MDL. So that makes it a little harder to
16 coordinate things, but that is still our goal.

17 So I just wanted to get that out there for you. Even
18 though I haven't issued an order to that effect, that is where
19 our minds are at and what we would like to see happen.

20 So having said that, Mr. Bernardo, I will go ahead and
21 let you say what you would like to say.

22 MR. BERNARDO: Well, thank you for those comments,
23 and hopefully, as unappetizing as it might sound, I would like
24 to turn the Jello into concrete here with respect to this
25 particular issue.

1 So just to maybe refresh your recollection to where we
2 were, this was an issue where plaintiffs challenged outside of
3 the MDL a group of about 1,500 documents and were challenging
4 them on the basis of privilege with an indication to Ethicon
5 that their intent was to use that as a first challenge but
6 work their way through the whole log.

7 That prompted us to seek coordination for a number of
8 reasons that we explained, and I won't go into those again.
9 And we've been working with the plaintiffs' counsel, and we
10 took that group of 1,500 documents, as you may recall, and got
11 rid of duplicates and narrowed it down in a very, very
12 cooperative and successful meet and confer which narrowed it
13 further, and we turned those 1,500 into 47 documents at
14 dispute.

15 And we served papers in the MDL, as did plaintiffs, and
16 served papers in the court in Texas.

17 We had a hearing in front of Judge Molberg in Texas --
18 and I apologize, I don't recall the date, but I can get that
19 for you, about a month or so ago -- and we argued both the
20 merits of the 47 documents as much as we could without
21 revealing privilege but based upon the papers that we had
22 submitted; and we also presented him with the same argument
23 that we had presented to you, Judge Eifert, regarding
24 coordination.

25 Within an hour or so of that argument, I was approached

1 by plaintiff's counsel and told that they wanted to meet with
2 us because they had changed their mind and wanted to agree to
3 have a Special Master appointed and were agreeable to
4 coordination, which we took as a really good development and a
5 positive development. And we worked with plaintiff's counsel,
6 and we agreed upon a Special Master in Texas, and his name is
7 Justice Keltner. He is a former justice on the Texas Court of
8 Appeals and currently a partner at Kelly, Hart & Hallman in
9 Fort Worth, Texas.

10 We also worked with plaintiffs to agree to an order
11 appointing Justice Keltner in ordering coordination between
12 the federal court and the Texas court with respect to these
13 privilege issues. Again, we think that's a very positive
14 development, and we appreciate having been able to work
15 collaboratively with plaintiffs on that, and we'd be happy to
16 send you any of those papers.

17 We then -- Ethicon -- put together a proposed protocol
18 that we were hoping would get entered both in Texas court and
19 the MDL that would describe what the coordination would look
20 like and what the procedure would be, because we think it's
21 important to make sure to a point you raised earlier that this
22 is all clear and that both sides understand we have
23 timetables, protocols, et cetera.

24 And we provided that to plaintiffs, and we met and
25 conferred over that, and we not surprisingly have some areas

1 of agreement with respect to that and some areas of
2 disagreement with respect to that, which I will address
3 shortly.

4 I will say one important area of agreement that I know
5 you were particularly interested in, Judge Eifert, is the
6 choice of the law. The parties have agreed that New Jersey
7 would be the law that governs the privilege dispute.

8 And you may recall in response to your question --
9 request for a motion or something on that issue, we provided
10 you some papers on that and where Ethicon was coming out with
11 exactly that same place. Although we also pointed out that
12 given the way different states approached this and uniformity,
13 chances are that even if you approach it from other
14 perspectives, whether federal law or under state law, that you
15 would probably come out the same way, and I think that was
16 another positive development that we all agreed on the choice
17 of law.

18 We tried to set up a conference with Justice Keltner,
19 which we did the other day, and we told him that -- we chatted
20 with him and explained our various positions on what
21 coordination would look like and told him that we were going
22 to bring you up to speed as to what's been going on and set up
23 a call so we could get both of your views.

24 And what we're going to be doing is yesterday we sent to
25 Justice Keltner our proposed protocols, plaintiffs and

1 defendants, and tomorrow we're going to send him the -- a
2 short memo addressing where the parties agree and disagree.
3 And we think it would be appropriate to provide those to Your
4 Honor as well, again in the spirit of coordination.

5 Again, the main disagreement -- and that's one thing we
6 wanted to chat with you about because what we are really
7 trying to do is solicit your input, solicit Judge Keltner's
8 input, and see if we can all come up with something that makes
9 sense, again, to turn the Jello into concrete.

10 The main disagreement is what is the role of the MDL in
11 looking at these documents.

12 And I will say from Ethicon's perspective -- and I know
13 plaintiffs will give you their perspective. From Ethicon's
14 perspective, it's always been our view that on the privilege
15 dispute, because of the risk of nonuniform ruling would mean
16 that both Your Honor and the Special Master in Texas would
17 collaborate. You would both look at the documents; you would
18 both come to whatever views you have. And then the important
19 part of the process would be for you to communicate with each
20 other to see if you could come to some agreement and issue a
21 joint ruling that could be entered both in the MDL and in the
22 Texas state court.

23 We recognize there may be some areas where you don't come
24 to agreement, and obviously those would be noted in a joint
25 kind of order. It's Ethicon's view that anything short of

1 that would really be not coordination. In other words, if
2 Justice Keltner were to look at those on his own, issue his
3 own report and recommendation, and then make that available to
4 you or something short of collaborative ruling and joint
5 recommendation, we don't think that really is coordination and
6 think that risks the very inconsistency as -- that we were
7 seeking in the coordination motion.

8 That's the main area of disagreement. There is also a
9 couple of other things which I think we can get through but I
10 will highlight them just so you're aware.

11 One is the procedural way of putting this in front of the
12 MDL. And plaintiffs have referenced, Judge Eifert, your
13 language about a motion in the February 11th hearing, and we
14 may have misunderstood but it was our impression that what you
15 were asking for was a motion or something creative that we can
16 think of to tee up the issue of the choice of law, and that
17 was the reason that we submitted that choice of law paper to
18 you, only for the purpose of addressing that.

19 So we think we complied with your request for a motion,
20 but if we didn't, we think that is something we can deal with.
21 In any event, as I alluded to earlier, the issue of choice of
22 law we think is really no longer an issue since the parties
23 have come to an agreement.

24 But if there is some other procedural mechanism whereby
25 there needs to be a piece of paper in order to put these 47

1 documents and any subsequent documents that will be identified
2 before Your Honor for purpose of coordinating, we'll be happy
3 to put that together and work with plaintiffs to agree.

4 So that was the second area of disagreement on procedural
5 issue.

6 The third and I think really last significant issue or
7 issue of disagreement is one of timing. I think the
8 plaintiffs are concerned that the MDL's participation will
9 slow the process down, and they have their trial date in
10 September.

11 Ethicon does not -- defendant does not think that really
12 is the case when we are prepared to work very aggressively to
13 try and work through as much of this -- as much of this as we
14 can.

15 I will point out that when we spoke with plaintiffs
16 initially after the hearing with Judge Molberg, I think they
17 recognized that we couldn't possibly get through the entire
18 privilege log in one case, and that that case was really, I
19 won't say, randomly picked, but there were other cases that
20 could have been picked but that was a case that already went
21 to trial so there didn't appear to be any magic in having it
22 resolved in connection with the Cavness case.

23 And, in fact, when we spoke with plaintiffs early on, I
24 think the understanding was that we would try and make
25 substantial progress in getting through as much of the log as

1 we could over the next several months.

2 And defendants have proposed a way to get through many
3 thousands of documents over the next several months by putting
4 them in tranches, working through them in an orderly manner.
5 Plaintiffs suggested -- which we think is a great idea and we
6 agreed to it -- that they could give us search terms so we
7 would put those search terms through the contents of the
8 privilege documents and see if we could try and bring to the
9 front of the line in groups of, say, 2,000 or so those
10 documents that we think are the most important to get
11 resolved.

12 So we don't really think that timing should be an
13 obstacle. And, again, we think that the critical thing here
14 is the coordinated effort, is coordinated rulings, is
15 consistency we could do in order to the parties' benefits here
16 and to other parties' benefits as well.

17 So to wrap up, what are we asking here? I think we've
18 crossed significant hurdles together. I think we've come to
19 significant agreement. And I think we're just looking to
20 referring -- again Jello -- to come up on a procedure that
21 benefits everybody. And I think we collectively have
22 accomplished something very good here with this coordination
23 and hope that this can become a model that can get used with
24 other cases as well.

25 So what we'd like to do is to send you the protocols that

1 we sent to Judge Keltner and perhaps ask you to reach out to
2 Judge Keltner and then see if we can set up a conference with
3 you and Judge Keltner and iron out some procedure so we can
4 move this along in an orderly and uniform way.

5 Again, thank you for putting up with my frogginess here.

6 THE COURT: I am very impressed. It sounds like you
7 have been working to death.

8 So I am going to let the plaintiffs say whatever they
9 want to say, but I have to tell you that I am extremely
10 impressed. It sounds like a lot of effort has gone into this.
11 And it to me was one of those issues that I, I knew it would
12 certainly be beneficial to work something out, but where to
13 begin just seemed to be an overwhelming, daunting task. So I
14 think you've really done an amazing job so far.

15 What do the plaintiffs have to say about this?

16 MS. BOSSIER: Judge, this is Sheila Bossier. I am a
17 partner at Freese & Goss law firm, and on behalf of the
18 plaintiff, Ms. Cavness.

19 As you say, we have made some great strides, and I
20 believe that we have a good working model for at least
21 getting, getting to the point of being able to address
22 documents more specifically.

23 On the privilege review, though, we do differ on the very
24 issue that -- the very same issues that Mr. Bernardo just told
25 you about. And I think what's most important to us right now

1 is obviously how quickly you are going to be able to resolve
2 this discovery dispute in order to obtain documents, if in
3 fact we are entitled to obtain them, such that they would be
4 of any benefit to us in this present litigation.

5 The main roadblock that we have had -- and I spoke to
6 Mr. Bernardo in our private conferences as well as to Justice
7 Keltner, our Special Master -- is the manner in which the
8 judges or the courts are going to coordinate. Because
9 procedurally, as I understand it, there is no -- these
10 documents are not before Your Honor or in MDL for decision at
11 present. So that there is no mechanism right now for the
12 court, your court, to use -- to review these specific
13 documents in response to any type of current discovery dispute
14 in the MDL.

15 So that then is a procedural issue that I don't know how
16 we overcome, other than we just come up with some sort of
17 agreement with the Court that if they would -- that you would
18 review those documents simultaneous to the Texas court review.

19 The main issue, though, is what coordination means. What
20 the defendants have proposed in their protocols they have
21 provided to Justice Keltner is that you, Magistrate Eifert,
22 and Judge -- Justice Keltner, our Special Master, not only
23 confer but that you actually issue a joint recommendation to a
24 state court judge, and presumably to Judge Goodwin, on the
25 documents that are at issue in Texas state court.

1 You know, everything else aside, I just believe that
2 that's a big burden that the parties are putting on you and
3 the MDL officially to -- we don't -- these documents are not
4 in front of you for review at present.

5 So that's where we are.

6 What we didn't -- what we believe coordination means is
7 that -- and this is what we put in our protocol and this is
8 what we asked of Justice Keltner, and that is, that Justice
9 Keltner reaches out to you -- honestly, he is, he is not
10 required to do that under Judge Molberg's order -- that he
11 reaches out to you and discusses with you the best method for
12 coordination that you two, the judges, decide would be the
13 most effective way to address the issues that the MDL, that
14 you addressed actually and that Judge Molberg addressed in his
15 order, and that is the consistency and difference to what has
16 already transpired in MDL from the years and that you are
17 aware of, that Texas state court judges, the Judge and Special
18 Master and those types of things, rather than us as parties,
19 as litigants, telling you this is how it should be done and
20 this is what we think you should do in a situation where this
21 matter's really not before you procedurally.

22 I believe that the better angle would be that before you
23 issue your report and recommendation, after you get through
24 all the document review, that -- that that causes the Special
25 Master to reach out to you and express to you what your

1 thoughts are before he issues a report and recommendation, and
2 that way he has conferred. If you have any specific issues
3 with where he is going with his opinions or -- and specific
4 issues that you can enlighten him about particular areas that
5 he may not be as familiar with as you, then that will all go
6 into your report and recommendation to the state court judge,
7 and then Judge Molberg will have the opportunity to review the
8 report and recommendation and make his decision.

9 As he is the only one that can do that. And I believe
10 you recognized that in the hearing that was held in February.

11 So that is our position. We, we agree that there needs
12 to be coordination. We have expressed that to Judge Molberg.
13 We expressed our concerns that this not hold up our efforts to
14 get the discovery in state court and that we want to move
15 forward as quickly as we can.

16 That is generally our position, Judge.

17 THE COURT: Okay. I think I understand where you're
18 coming from on that.

19 As far as the procedural aspect of it, I don't see that
20 as being a big stumbling block. What has happened in the
21 other cases that I've had where this issue has come up is the
22 plaintiff has just filed a motion -- the plaintiffs -- in the
23 MDL challenging the confidentiality of various documents.
24 Simple motion. It just says, plaintiffs challenge the
25 confidentiality of various motions and move to compel their

1 disclosure. It's simple. Very simple.

2 So that could be done easily. I don't think that is a
3 big issue. So that could be done quickly.

4 I think as far as timeliness goes, I'm not real concerned
5 about that either. I think it can be done quickly as well.
6 I'm certainly willing to work as hard as I can to help you
7 meet whatever deadlines you need to meet. I understand that
8 you are not in the MDL, and I don't want to do anything that
9 would slow down your separate schedule. And I would certainly
10 want to help in any way that I can.

11 I think I would feel sorry for Justice Keltner if he is
12 going to have to look at all of these documents on the
13 privilege log. I don't think that's anything that any judge
14 would really want to do.

15 So as far as the coordination goes, I don't think it is a
16 bad idea to perhaps let me and Justice Keltner talk, and
17 perhaps we could find a way that would suit both of us as far
18 as how to coordinate.

19 I mean, obviously he is, he is doing this for a specific
20 case, and I'm looking at it in terms of just the broad picture
21 of how this is going to work for all of these cases in the MDL
22 going down the road. And we don't know what's going to happen
23 to these cases. They may be remanded. There may be a group
24 that are tried. They may resolve. I don't know what's going
25 to happen.

1 But, I mean, how many cases are there, Mr. Bernardo, left
2 in the Ethicon MDL?

3 MR. BERNARDO: I believe the number is in the
4 thousands. Off the top of my head, I want to say 30. I don't
5 know if that's correct.

6 THE COURT: Forty -- 30, 40,000. I mean, there's a
7 lot. There is a huge, a huge impact. And, you know, when
8 you're talking about privilege documents, once they are out
9 there, they are out there. So it's an important issue.

10 So, you know, I'm sure that Justice Keltner would see it
11 that way as well. And maybe -- I would love to see what
12 you've done. I would love to see your suggestions, and then I
13 would also love the opportunity to speak with Justice Keltner
14 and get his thoughts and see where he is on -- in the process
15 and see how I can help him, how maybe I can be of service to
16 him.

17 You know, maybe what he would want to do is just divide
18 up some work. I don't know.

19 But I do think that -- I'm happy to hear that you want to
20 coordinate it, because I would think that's definitely going
21 to be the best thing for everyone involved: the judges, the
22 parties, the lawyers, everyone.

23 MR. BERNARDO: Well, thank you very much. This is
24 Richard Bernardo. Thank you, Judge Eifert.

25 And might I suggest just as a concrete way to proceed

1 with it, what we will do is tomorrow, when we circulate our
2 memo to Justice Keltner, we will provide you with both those
3 memos as well as the protocols. And then whoever sends it to
4 you, we can also include with that Justice Keltner's contact
5 information, and we will provide to him your contact
6 information and leave it to the two of you to coordinate with
7 each other as a first step.

8 And then we had in mind that we would, at your and
9 Justice Keltner's convenience, make ourselves available for a
10 joint telephone call so we can try and iron out any issues,
11 procedural issues, and at the same time we will undertake to
12 work with Ms. Bossier in terms of the tranches and the numbers
13 because I don't think that's necessarily something that you
14 and Justice Keltner need to be as involved in. In other
15 words, you know, how many documents do we pull and how quickly
16 can we duplicate them and things like that. We can see if we
17 can iron that out among ourselves. I think we've been making
18 good progress.

19 THE COURT: Right. No, that sounds great.

20 And, you know, with Judge Molberg, I really did not feel
21 comfortable interposing myself in the situation previously.
22 There was a motion in front of him. It was already scheduled
23 for a hearing. I did not feel comfortable contacting him and
24 trying to interpose myself in his case. And so I did not try
25 to make contact with him because I just did not feel that was

1 appropriate.

2 Now that I hear that Judge Molberg is interested in
3 coordination and Justice Keltner is the Special Master and he
4 is interested in coordination, then I would be more than happy
5 to contact him and try to open the lines of communication and
6 see how we can work together. Because that's certainly what I
7 know Judge Goodwin would like to have done, and it would make
8 it easier on all of us I think.

9 So as soon as you get me the information, I will try to
10 touch base with him and have some conversation and see what we
11 might be able to do to make this work.

12 MR. BERNARDO: We appreciate -- this is Richard
13 Bernardo. We appreciate that, Judge Eifert, and we will get
14 that information to you.

15 THE COURT: All right. Sounds wonderful.

16 MS. BOSSIER: Thank you, Judge. We appreciate your
17 time.

18 THE COURT: Thank you. You have done a beautiful
19 job. I'm very, very impressed. So it's been a lot of work,
20 I'm sure, but thank you for doing it.

21 MR. BERNARDO: Thank you, Judge.

22 MS. BOSSIER: Thank you.

23 UNIDENTIFIED SPEAKER: Bye-bye.

24 UNIDENTIFIED SPEAKER: Thank you, Judge. Bye-bye.

25 (Proceedings concluded at 2:32 p.m.)

1 CERTIFICATE OF REPORTER

2
3 I, Mary A. Schweinhagen, Federal Official Realtime
4 Court Reporter, in and for the United States District Court
5 for the Southern District of West Virginia, do hereby certify
6 that pursuant to Section 753, Title 28, United States Code
7 that the foregoing is a true and correct transcript of the
8 stenographically reported proceedings held in the
9 above-entitled matter and that the transcript page format is
10 in conformance with the regulations of the Judicial Conference
11 of the United States.

12
13 s/Mary A. Schweinhagen

14 _____ April 16, 2015

15 MARY A. SCHWEINHAGEN, RMR, CRR
16 FEDERAL OFFICIAL COURT REPORTER
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